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# Funes v. Aardema Appellant's Brief Dckt. 35923

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IN THE SUPREME COURT OF THE STATE OF IDAHO

\* \* \* \* \*

FILADELFO M. FUNES,

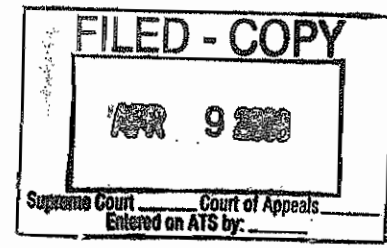
Docket No. 35923-2008

Claimant/Appellant,

V.

AARDEMA DAIRY, Employer, and  
STATE INSURANCE FUND, Surety,

### Defendants/Respondents.



\* \* \* \* \*

APPELLANT'S OPENING BRIEF

## Appeal from the Idaho State Industrial Commission

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## **STATEMENT OF FACTS**

This is an appeal from the Idaho State Commission wherein the Claimant, Filadelfo M. Funes, on January 29, 2005, sustained a farm related injury. Mr. Funes contended that as a result of said injury he had either sustained permanent total disability or substantial permanent partial disability. The Industrial Commission found that Mr. Funes, the Claimant/Appellant, was not totally disabled but rather had sustained only a 25% whole person physical disability.

Filadelfo M. Funes, Claimant/Appellant herein, was born in Honduras; received two years of elementary education; is able to speak the Spanish language; reads the Spanish language poorly; and, is unable to speak English. He became a legalized resident of the United States in 1998. *Tr.*, p. 20, LL. 5-21. In Honduras, Mr. Funes worked as a truck driver, operating a truck that carried approximately five tons, and he also worked as a taxi cab driver for 10 to 15 years. *Tr.*, p. 21. He came to the United States, moved to Idaho and engaged in manual heavy labor types of work, such as working in the potatoes, working for Rite Stuff lifting 50 to 60 pound baskets; and then working on dairies, which work involved milking and other dairy-related activities, which Mr. Funes described as heavy work. *Tr.*, pp. 21, 22, 23, 24,

25 and 26. Mr. Funes' earnings for the year 2003 was \$21,939.33; and for the year 2004 - \$24,174.85 **Claimant's Rule 10, 8.**

Mr. Funes, on January 29, 2005, sustained an on-the-job injury to his neck and lumbar spine. His treating physician was Dr. David Verst, of Hailey, Idaho, who specializes in "spine surgery". **Tr.**, p. 5, LL. 1-4. Dr. Verst, on May 2, 2005, performed a surgery which he described as a far lateral discectomy at the L5-S1 level, decompressing the exiting nerve root, which is the L5 nerve root. Dr. Verst diagnosed Mr. Funes' problem as a "far lateral disk herniation". **Tr.**, p. 7, LL. 21-25; p. 8, LL. 1-7.

The operative report, dated May 2, 2005, showed that "[t]he patient presents with severe right leg pain. It has been ongoing for the past few months." **Defendant's Rule 10, 3-13.** The report further shows "[o]nce the discectomy was undertaken, the L5 nerve root was freed." **Defendants' Rule 10, 3-14.** Dr. Verst's office notes of July 21, 2005, state, "continues to struggle with back pain". **Defendants' Rule 10, 3-23.** A lumbar MRI exam was conducted on August 19, 2005, which showed post-operative changes at L5-S1 with enhancing scar tissue surrounding the right S1 nerve root and the right neural foramen. **Defendants' Rule 10, 6-3.**

Mr. Funes was examined by Dr. David M. Christensen on August 23, 2005. Dr. Christensen, a member of the Intermountain Spine & Orthopedics Clinic, in his report noted the following:

"That Mr. Funes' symptoms all began with the lifting incident and have not ceased since that time. The patient works feeding and moving calves. While

attempting to lift a calf that weighed between 130 and 150 pounds, the calf struggled and the patient immediately began experiencing pain in the region that he now currently complains of pain in. The pain has been near constant since the patient's injury, with only minor brief improvements with therapeutic injections and for a short period of time immediately following his discectomy."

At that time, Dr. Christensen believed that Mr. Funes' condition was not stable, and he placed restrictions on Mr. Funes' employment, which restrictions would be temporary in nature "until patient's clinical symptoms improve". Dr. Christensen's restrictions were:

"I believe Mr. Funes could work in a very limited capacity lifting no more than 10 pounds. He could stand, walk and sit on occasion but should not be required to stay in any one position more than 20 to 30 minutes at a time. He could also push pull up to 20 pounds."

**Defendants' Rule 10, 2-5, 2-6.**

In response to a letter of January 29, 2007, from Kathy Proctor of the State Insurance Fund, Dr. Verst summarized Mr. Funes' medical problems as follows:

**"Diagnosis:**

1. Mr. Funes suffers from chronic lumbar discogenic pain that associated with radiculitis secondary to scar tissue irritating the L5-S1 level. . . .

The conditions responsible for the industrial accident include the discogenic pain and radiculitis secondary to scar tissue buildup and chronic pain secondary to global degenerative disc disease at the L5-S1 level. . . .

Objective Findings correlating to his subjective complaints include radiculitis involving the right lower extremity that tends to travel in the L5 dermatome. He

has pain in the lower back with an altered gait secondary to pain. . .

At this juncture, Mr. Funes has failed to improve with conservative modalities following his surgery. He continues to struggle with back pain and radiculitis. . . .

The lumbar spine is much more complicated secondary to the scarring around the nerve, discogenic pain, and foraminal stenosis. . . .

Regarding work, Mr. Funes feels that he cannot work secondary to the amount of pain and disability he is currently suffering from. We are limited with job opportunities secondary to employability with Mr. Funes. He can only speak Spanish, education is limited, his working life is focused primarily on labor, and therefore at the current time we are very limited with his current abilities."

**Defendants Rule 10, 3-32.**

Dr. Verst noted in a report dated April 2, 2007, that Mr. Funes presents with chronic back pain with associated chronic right leg pain. Dr. Verst stated, "I suspect Mr. Funes suffers from neuropathic pain secondary to scar tissue around the nerve root." He also noted "[h]is symptoms far outweigh his objection MRI findings". Dr. Verst concluded,

"Mr. Funes does present with an impairment and disability as mentioned earlier. I strongly feel that we need to bring closure to Mr. Funes' case and provide him with the appropriate impairment and disability."

**Defendant's Rule 10, 3-34.**

Dr. Verst, in his deposition, stated:

"A: And, he has pain in the lower back with altered gait secondary to pain."



Q: Would you explain that sentence please.

A: In each visit with Mr. Funes he had a cane in his hand and he walked with a limited stance on his right leg. So when he would walk, he would put as little pressure and move that leg as quickly as possible to avoid any pressure on that leg. That is an abnormal gait that is considered an antalgic gait. I felt that his gait was altered because of pain.

Q: And that would have been – that would relate to the subject accident would it not doctor?

A: Yes.”

**Verst depo.**, p. 32, LL. 23-25; p. 33, LL. 1-9.

In the taking of Dr. Verst's deposition, Dr. Verst was asked on direct examination by counsel for the Defendants/Respondents the following question:

“Q: Based on the last Functional Capacity Evaluation memo that you put down is it correct that you believe that Mr. Funes could have returned to work?

A: Yes.

Q: And that he can work to the – as far as from an objective point of view, can return to any work that he was doing prior to the time of injury. Is that correct?

A: Yes.”

**Verst depo.**, p. 25, LL. 17-25; p. 26, L. 1.

On cross-examination, Dr. Verst qualified his answer as follows:

“Q: Now you've stated in response to Mr. McFeeley's question, that you felt that Mr. Funes could return to the type of work that he was doing before this accident, which was working on a dairy farm, working with cattle, lifting calves up to 150 pounds. I would call that, I think, quite a vigorous type of employment. Are you recommending that he return

to that level of work with his back and the problems he's having?

A: What I had stated is that patients that undergo microsurgery can get back to their normal jobs, their normal life, without the fear or risk of reherniation, reherniating a disc or creating any kind of mechanical instability. That is the 99.9% of patients that undergo microsurgery microdiscectomies. With Mr. Funes, he has the subjective complaints with very limited objective findings that substantiate those subjective complaints. What I had stated was that Mr. Funes could safely go back to work full time and go back to these types of activities without creating any harm to his back.

Q: Okay. Now, that's from – that would be kind of from a skeletal point of view. As far as anatomy is concerned the anatomy has been repaired to the point where he could return to that type of work without the fear of reherniating his back. That's what you're saying?

A: Structurally yes.

Q: Now we have to superimpose on that skeleton so to speak the factors of how that injury affects the particular individual and this particular injury with Mr. Funes has affected him to the point where he is suffering from continuous and chronic pain related to the subject accident. Isn't that true?

A: Yes."

**Verst depo.**, p. 37, LL. 12-25; p. 38 LL. 1-24.

"Q: If Mr. Funes said that when he's riding in a truck and his back bothers him from bouncing – other words, bouncing tends to produce pain – would that be a reasonable – would that be a reasonable thing for him to report, bouncing in a truck would cause back pain.

A: Sure.

Q: And if it caused back pain that would be a type of work that he should probably not be involved in. Wouldn't you agree with that?

A: Yes.

Q: And you would agree with me that bodily movement is limited by pain.

A: Yes."

**Verst depo.**, p. 40, LL. 20-25; p. 41, LL. 1-9.

Gregory Dean Taylor, an employee with the Idaho Industrial Commission and a rehabilitation consultant, has worked in the Twin Falls office for 17 years and is familiar with the employment opportunities in central Idaho. **Tr.**, p. 98. Mr. Taylor first met Mr. Funes on March 23, 2005, as a referral from claims examiner Mike Fisher with the Defendant, State Insurance Fund. Mr. Taylor stated that Mr. Funes cooperated with him in making appointments and in working with him. "[h]e has been very good about coming in on a monthly basis." Mr. Taylor stated that he had been unable to find employment for Mr. Funes from which he, Mr. Funes, could earn a gainful living. **Tr.**, p. 100, LL. 12-17. Mr. Taylor stated that he tried to find light duty work for Mr. Funes with his employer, Defendant, Aardema Dairy, who provided a light duty job. The job consisted of driving a tractor, hauling water to calf pens. He also had another job where Mr. Funes could walk through cattle pens, tagging calf ears with identification tags. Mr. Funes tried the work and reported that driving the tractor was jarring and bouncing which caused back pain. **Tr.**, p. 101. Mr. Funes, at the time of hearing, testified as to his symptoms:

"A: Well, because of the pain in my lower back I just have a lot of pain. There is no way that I can stay

sitting for a long time. I have to be moving because I get numb. That's the way it is. That's why I can't be standing for very long or sitting for very long. I just can't stand it. I can't take it being for a long time sitting or standing."

Tr., p. 43, LL. 2-9.

Mr. Funes continued:

"The doctor sent me back to work for 4 hours, but the first day it was really a sacrifice for me to stand 4 hours. But the first day I didn't even drive for 4 hours because the tank was empty. And so they had to fill the tank and then -- with water. And then when I started driving, I was driving, but I was making a big effort. It was really a sacrifice for me because I really have problems with this leg. And when I finished driving and I was going back home, I couldn't stand the pain. And when I went back the next day and before I finished work, I just couldn't stand it. I couldn't stand the pain, and I had to leave. And I called the doctor before I finished my 4 hours."

Tr., p. 45, LL. 10-25; p. 46, L. 1.

With reference to returning to work, Mr. Funes continued:

"Q: Now do you believe that you could return back to the type of work that you were doing before the accident? First of all I'll direct your attention to dairy type of work.

A: Like the work that I was doing?

Q: Yes. Before the accident referring now to dairy type of work.

A: In the condition that I'm in no.

Q: Explain please why not.

A: Well because before, I didn't have any of the problems that I have now. I didn't have to walk with a cane or grab on to anything when I walk or when I worked. Now I feel like my waist shakes and I feel

pain and I don't have strength in my leg and my knee, my right leg.

Q: Alright. Could you work a taxicab?

A: I don't think I could that job as a taxi driver because a taxi driver has to pick up luggage. A taxi driver has to be able to pick up luggage. How could I bend over and pick up luggage and use both my hands with my lower back and my leg the way they are and with a cane?

Q: Do you believe that you could return to a truck driving type of job?

A: I couldn't do that. It's not that I don't want to do that. I'd much rather be working than have the problem that I'm getting by with right now and a truck driver, doesn't matter if you do short haul or long haul. You have to get up and down out of the truck and you have to be picking up chains and working with different packages and tools and I don't think I could drive a truck.

Q: Is there any type of work that you know of that you believe you could perform in this locality the Twin Falls locality. That's Twin Falls, Idaho, Jerome, this whole surrounding area geographical area. Is there any type of work that you believe you could perform?

A: Well, not here no. I don't think so because the man that finds work for people who are injured from here, Greg – I don't know his – well, any way, he wasn't able to find anything for me. And the situation that I'm in I don't think I could find work.

Q: Are you willing – have you been willing to go out and look for work?

A: Well, if I were to go out and look for work in the situation that I'm in, I don't think I would find work because the man here wasn't able to find any work for me. One problem is that I can't read. I can't

write. I can barely write my name. Who would give me work like that?"

Tr., p.

Mr. Greg Taylor was questioned regarding the level of exertion involved in the milking duties of a dairy:

"A: Actually, milking is a pretty difficult job in that the workers are required to be on their feet the entire shift, whether it's 8 hours, 10 hours or 12 hours at some dairies. So they're constantly moving. They may milk as many as well, some dairies are set up with rows of 10 milking machines on each side. Smaller dairies may have 8. The largest ones I've seen had 16 milking machines on each side to where the workers are constantly moving, placing the milking machines on the cow and then taking it off when it's finished.

Q: Okay. And why, in your opinion would Mr. Funes be unable to do that type of employment?

A: Well several reasons. The necessity to be on his feet for the entire shift. There is some forward bending involved to reach with the machine into the utters and place the machine onto the utters. It's a very physical job. Constant moving.

Q: How about employment working on a dairy driving a truck? Mr. Funes has had some of that experience. And would he be able to return to that type of work in your opinion?

A: Well the work is available in the area. Based upon the medical reports, he would likely have some difficulty climbing in and out of the truck. The first step on a truck is roughly 18 inches from the ground. The second step is another 12 inches. And then pulling oneself into the cab would essentially make it 3 steps. And then the bouncing involved.

Q: And bouncing?

A: Um hum.

Q: Would there be some lifting involved associated with truck driving?

A: It would depend on the employer and their function. For example manure truck drivers do very little lifting. Milk tank drivers do a lot of climbing, lifting hoses. Beet truck drivers basically drive the truck with little lifting involved.

Q: Okay. And working as a beet - - do you think that he could work as a beet truck driver in your opinion? What problems might he experience in your opinion based upon the job of beet truck driving?

A: Bouncing through the fields."

Tr., p. 102, LL. 19-25; p. 103, LL. 1-25.

At page 104, Mr. Taylor testified that he closed Mr. Funes' case. He explained the reason as follows:

"A: I didn't feel there was really anything I could do as far as helping Mr. Funes find employment. Mr. Funes felt he was not able to work and the medical restrictions were very restrictive as far as trying to help him find something within work he know how to do. He speaks Spanish only which limited the job market.

Q: Now your record shows you have seen Mr. Funes numerous times for the past 3 years. Is that correct?

A: Yes that is correct.

Q: When people come in and talk to you and give you information do you observe their conduct, how they conduct themselves, how they move, how they walk, do you look at those things?

A: Yes.

Q: And why do you look at those things?

A: Well I want to make sure that the verbal matches what I see, the verbal description of how they feel matches what I see and how they act.

Q: Do you have a comment regarding that with reference to Mr. Funes as to how they feel, what they tell you and how he acts? Do you have a comment on that?

A: Each time that Mr. Funes would come into the office he and his daughter who translated would discuss the pain he was having throughout his lower back and legs. He used a cane, gosh, I think almost the entire 3 years that I was working with him, at least 2 of the 3 years. I can't remember exactly when I first saw him use a cane but he used it for balance purposes. There were several times I saw him lose his balance and had to hold himself up with the cane.

Q: And did you see something that you felt was deceptive about what he was telling you and how he was conducting himself physically?

A: Well in my opinion no I didn't."

Tr., p. 106, LL. 9-25; p. 107, LL. 1-25.

On cross-examination by counsel for the Defendants/Respondents, Mr. Taylor, in an effort to take a realistic approach to job availability for Mr. Funes, stated:

"A: The reason for my hesitation, counsel, is I'm thinking over Mr. Funes' past work history and what he's limited to on a realistic basis as far as finding work. I believe that he's limited to agricultural work, dairy work, some service industries where there may be other, in his case, people who speak Spanish that could speak it him and give him instructions."

Tr., p. 121, LL. 7-23.



On April 12, 2007, the Defendant arranged for Mr. Funes to be examined in Boise by a panel of doctors namely Dr. Joseph Daines, Dr. Eric F. Holt and Dr. Richard W. Wilson. It was the opinion of Dr. Eric F. Holt that Mr. Funes was exaggerating his pain symptoms in a naïve and unsophisticated manner and was attempting to portray himself as an invalid so he would have secondary gain. Dr. Holt, at the conclusion of his report, noted that both himself and his secretary observed Mr. and Mrs. Funes coming and going from his office, "I left just after they did and observed Mr. Funes walking with his cane with an antalgic gait and his wife was walking in a normal manner. He entered the car in a slow and careful manner. His wife entered it in a normal manner." It was the panel's opinion that Mr. Funes, as a result of his work injury and lumbar laminectomy, would have a lifting limit of 50 pounds, 25 pounds on a regular basis, carrying 50 pounds on an occasional basis and limited stooping and bending. The panel was of the opinion that factors of secondary gain and misconception of his post-operative lumbar spinal anatomy was responsible for causing his persistent pain. **Defendant's Rule 10, 6-8.**

It should be noted that the panel, in reaching this conclusion, ignored their medical note on page 3 of their report with reference to the follow-up lumbar MRI exam on August 19, 2005, at Magic Valley Regional Medical Center, which report showed "post-operative changes at L5-S1 with enhancing scar tissue surrounding the right S1 nerve root and the right neural foramen", which finding was elaborated upon by Dr. Verst in his letter of January 29, 2007, wherein he stated:

"Objective findings correlating to his subjective complaints include radiculitis involving the right lower extremity that tends to travel in the L5 dermatome. He has pain in the lower back with an altered gait secondary to pain."

**Defendants' Rule 10, 3-32.**

Now returning to Mr. McFeeley's examination of Mr. Taylor and assuming that the physical limitations imposed by the panel are correct and which limitations do not take into consideration the factor of pain, Mr. McFeeley, counsel for the Defendant/Respondent stated:

Q: There are job opportunities out there correct?

A: Yes.

Q: All right. There are Spanish speaking or only Spanish speaking people working at for example restaurants, correct?

A: Yes.

Q: Washing dishes you know, being cooks, being some sort of servers, a number of service related things correct?

A: That's correct.

Q: In many fast food restaurants for example; is that not correct?

A: It's correct.

Q: And a number of non-fast food restaurants; is that correct?

A: That is correct.

Q: And you expressed concern about Mr. Funes' English abilities correct?

A: Correct."

Tr., p. 122, LL. 11-25; p. 123, LL. 1-12.

Mr. McFeeley then continued:

"Q: Any reason that he can't be a taxi driver physically?

A: Physically the only drawback he would run into would be lifting heavy baggage. That's on a case by case situation for a passenger or passengers.

Q: Any reason that he couldn't work as a truck driver where he indicated I believe, that he didn't really have to do much? He didn't have to load? Any physical limitations on that?

A: Well, climbing into the truck would be the most difficult."

Tr., p.

On redirect examination Mr. Taylor was questioned as follows:

"Q: Mr. Taylor does pain figure into a person's ability to carry out a job? Does pain have any impact on a person's ability to work, in your opinion?

A: In my opinion yes."

Tr., p. 133, LL. 7-11.

Mr. Taylor was further questioned:

"Q: And I want you to take into consideration what Dr. Verst's first diagnosis of chronic lumbar discogenic pain and ask you how that would impact his earlier findings, I guess earlier work restrictions which he set down of climbing, bending, kneeling, crouching, twisting, sitting, standing and walking. How does chronic pain impact those physical functions in your opinion?

A: Well in my opinion I think it would lessen the person's abilities. It would restrict their abilities more.

Q: Okay and so that's going to restrict their abilities for employment will it not?

A: Yes.

Q: And if you take the fact of chronic lumbar discogenic pain into consideration with these limitations what is your opinion as to Mr. Funes' ability to go out and get a job consistent with his work experience, past work experience?

A: In my opinion?

Q: Yes.

A: I think it would have a very negative effect on being able to find employment or to be hired.

Q: In your opinion would he be hired?

A: I highly doubt it."

Tr., p. 135, LL. 12-25; p. 136, LL. 1-14.

The Industrial Commission Referee, in his recommendation of Findings of Fact and Conclusions of Law, concluded that "[t]he Claimant has sustained a 10% whole person permanent partial impairment rating as a result of his occupational injury" (R., Finding No. 70, p. 26) and that Claimant had sustained a permanent partial disability rating in the amount of 25% inclusive of his 10% permanent partial impairment rating. (R., Finding No. 77, p. 30).

Claimant's request for a finding of total and permanent disability, or in the alternative for a finding of a substantial award for permanent partial disability was rejected.

### **ISSUES ON APPEAL**

1. That the Industrial Commission committed error in its determination that Claimant was only entitled to a permanent partial disability rating of 25% of the whole person, inclusive of his permanent partial impairment.
2. That the Industrial Commission committed error in its failure to find that Claimant was totally and permanently disabled.
3. That the Industrial Commission committed error in its failure to find that Claimant was classified as an odd lot worker.

## ARGUMENT

The standard for review of a decision of the Idaho State Industrial Commission is limited to questions of law. The findings of the Commission will not be disturbed on appeal when supported by substantial and competent evidence. However, the provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Liberal construction in favor of the worker is required to enable the Act to serve the humane purposes for which it was promulgated leaving no room for narrow technical construction. ***Sprague v. Caldwell Transportation, Inc.***, 116 Idaho 720, 779 P.2d 395, at 396 (1989).

Permanent disability or under a permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. An evaluation rating of permanent disability is an appraisal of an injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of the kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable

geographical area considering all the personal and economic circumstances of the employee and other factors as the Commission may deem relevant.

In the consideration of Mr. Funes' industrial claim and assuming the Industrial Commission was correct in determining Mr. Funes' physical limitations are as advised by the medical panel, that is, he is only able to lift not over 50 pounds, lift up to 25 pounds on a regular basis, carry 50 pounds on an occasional basis and limited stooping and bending, the Industrial Commission Finding No. 72, pages 27-28, the Commission found only very limited employment, specifically, Claimant would qualify for driving jobs without loading and unloading requirements and for various types of restaurant work. (R., Finding of Fact No. 74, p. 28.) When you take into consideration that Mr. Funes, before his industrial accident, was employable in all forms of heavy labor and is now reduced to work involving limited driving jobs without loading and unloading and to various types of restaurant work, it is apparent that he has suffered a very substantial loss of ability to compete in the open labor market. In its finding of only a 25% disability rating, the Industrial Commission appears to have ignored its finding of Dr. Verst that Mr. Funes' "job opportunities are very limited because of his lack of education, inability to speak English and work history focused on labor". (R., Finding of Fact No. 39, pg. 18.

The Industrial Commission, in its determination of permanent partial impairment also fails to give any consideration for the chronic pain suffered by Mr. Funes. The Commission is correct in its finding that Mr. Funes' physicians have identified what they described as "symptom exaggeration". However, it is also true that Dr. Verst, Claimant's treating surgical physician, has identified objective

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findings which correlate to Mr. Funes' subjective complaints which "include radiculitis involving the right lower extremity that tends to travel in the L5 dermatome. He has pain in the lower back with an altered gait secondary to pain". **Defendants' Rule 10**, 3-32. This medical conclusion of Dr. Verst is supported by Dr. Christensen and is demonstrated by findings on the MRI, "[a] follow-up lumbar MRI exam on 08/19/05 at MVRMC was reported to show postoperative changes at L5-S1 with enhancing scar tissue surrounding the right S1 nerve root and the right neural foramen." **Defendants' Rule 10**, 6-3. It is herein submitted that it was error for the Industrial Commission to ignore this objective evidence, which in itself establishes that Mr. Funes suffers from chronic pain. The Industrial Commission to ignore this finding in its determination of disability for Mr. Funes is wrong. See *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (Idaho 2008), wherein it is stated:

"This Court does not scrutinize the weight and credibility of evidence relied on by the Commission and will not disturb any findings regarding weight and credibility unless they are clearly erroneous."

When the factor of pain is inserted into the employment computer, Mr. Funes' opportunities for gainful employment are, according to Mr. Taylor, the vocational counselor, dark.

"Q: In your opinion, would he be hired?

A: I highly doubt it."

Tr., p. 136, LL. 13-14.



Likewise, it is submitted that in considering Mr. Funes' pain, he fits within the definition of an odd lot worker. As is well known to this Court, an odd lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. ***Lyons v. Industrial Special Indemnity Fund***, 98 Idaho 403-406, 565 P.2d 1360, 1363 (1963).

### CONCLUSION

In conclusion, it is herein respectfully submitted that Mr. Funes should herein be classified as an odd lot worker or, in the alternative, Mr. Funes should be awarded permanent partial disability in a substantially higher percentage than 25% of the whole person.

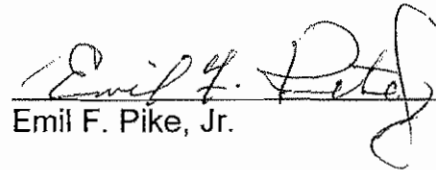
RESPECTFULLY SUBMITTED this 8 day of April, 2009.

  
Emil F. Pike, Jr.  
Attorney for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I am a resident attorney of the State of Idaho and that on the 8 day of April, 2009, I served a copy of the foregoing document, by depositing a true copy thereof in the United States mail, postage prepaid, upon the following:

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